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Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
ROBERT J. COSTAGLIOLA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States

ANN ELIZABETH REESMAN *
RICHARD C. SPITALNIK
MCGUINESS NORRIS & WILLIAMS LLP
1015 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

* Counsel of Record

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* with the consent of the parties. The brief urges reversal of the Fourth Circuit's decision below, and thus supports the position of Petitioners Graham County Soil & Water Conservation District, *et al.*[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 330 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to federal employment statutes and regulations. Most of EEAC's member companies and many of the Chamber's members do business nationwide, and many are federal contractors covered by the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. Collectively, EEAC's and the Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance

programs designed to ensure that all of their employment actions comply with applicable legal requirements.

Members of EEAC and the Chamber have an ongoing, substantial interest in the application of an appropriate statute of limitations for employees' claims that they were retaliated against for engaging in activity protected by the FCA. Statutes of limitations serve an important function in our legal system—to prevent the filing of stale claims, where witnesses and documents may be long gone. The Fourth Circuit Court of Appeals applied a statute of limitations that far exceeds the statute of limitations for any other retaliation or whistleblower claim created by Congress and the overwhelming majority of states. This was based on an improper reading of the FCA. The result is that employers will have to defend untimely claims long after witnesses and documents have become unavailable.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC and the Chamber are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Karen Wilson, a former part-time secretary at the Graham County Soil & Water Conservation District in North Carolina, resigned on March 7, 1997. Pet. App. 2a-3a. Nearly four years later, Wilson brought a *qui tam* action under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, alleging that her coworkers had submitted false claims to the federal government in violation of the FCA and that she was constructively discharged for reporting these activities in

violation of the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h). Pet. App. 3a.

Graham County moved to dismiss Wilson's retaliation claim on the ground that it was barred by the applicable statute of limitations, which was three years under North Carolina law. *Id.* Agreeing that the six-year statute of limitations for *qui tam* actions under 31 U.S.C. § 3731(b)(1) does not apply to whistleblower retaliation cases, the district court applied North Carolina's three year statute of limitations, and granted the motion. *Id.* Wilson appealed to the Fourth Circuit Court of Appeals. Pet. App. 4a.

The Fourth Circuit reversed the district court's order in a 2-1 decision. Pet. App. 28a. The Fourth Circuit focused on the language of Section 3731(b)(1), which provides that "a civil action under 31 U.S.C. § 3730 may not be brought more than 6 years after the date on which the violation of 31 U.S.C. § 3729 is committed . . . ." Even though Section 3729 only addresses submitting false claims to the government, and does not address the retaliatory conduct described in Section 3730(h), the Fourth Circuit applied Section 3731(b)'s 6-year statute of limitations for violations of Section 3729, because the plain language of Section 3731(b) refers to actions brought under Section 3730(h). Pet. App. 13a. In so doing, the Fourth Circuit expressly rejected the analysis of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), which had applied California's one-year statute of limitations to a retaliation claim under the FCA, and adopted the rationale of the Seventh Circuit in *Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994).

In his dissent in this case, Judge J. Harvie Wilkinson III argued that "the answer is not so simple." Pet. App. 30a. The limitations period in Section 3731(b)(1) refers to six years after the date on which the violation of Section 3729 is committed. *Id.* Thus, Judge Wilkinson contended, "[t]he six-year period is tied to a violation of § 3729, and nothing

else." Pet. App. 31a. An employer could, he aptly theorized, retaliate against an employee for engaging in protected activity even if there has been no Section 3729 violation—leaving the statute of limitations without a starting point. *Id.* Typically, Judge Wilkinson said, limitations periods for actions for retaliation commence with the retaliatory act. Pet. App. 35a. There is no logical basis for tying the limitations period to the date on which the false claim violation itself took place, when a civil action arising under Section 3730(h) stems from the separate and distinct act of retaliating against an employee for reporting the false claim. Pet. App. 35a-36a.

Graham County sought a writ of *certiorari*, which this Court granted.

SUMMARY OF ARGUMENT

The Fourth Circuit's interpretation of 31 U.S.C. § 3731(b)(1) to apply the statute of limitations for false claim actions to retaliation actions under the False Claims Act is based on an incorrect reading of the statute, and has the potential to significantly diminish both a whistleblower's attempts to bring retaliation claims and an employer's ability to defend claims that have gone stale.

Section 3731(b)(1)'s six year statute of limitations should not be applied to retaliation claims under the False Claims Act because the statute and legislative history demonstrate that it was intended to apply only to claims where fraud in violation of § 3729 is alleged. Section 3731(b)(1) does not apply to retaliation claims because there is no need to show a violation of § 3729 to sustain a retaliation claim. As Judge Wilkinson notes in his dissent, the only way that Section 3731(b)(1) would apply to retaliation claims would be to "lop[] off" the part of the statute that ties retaliation claims to the date an alleged false claim occurred. Pet. App. 30a.

Applying a statute of limitations for retaliation claims that is unrelated to the retaliatory conduct will lead to absurd results that could frustrate the purpose of the FCA. As Judge Wilkinson states, the Fourth Circuit's decision goes to "extraordinary lengths" to resist the "thoroughly ordinary principle" that the statute of limitations for a retaliation claim should begin to run on the date of the retaliatory act, not an unrelated act. Pet. App. 36a. Tying the statute of limitations to a false claims violation could effectively deprive employers of any statute of limitations protection where no false claims violation is established, because the statute would never start to run. In addition, applying a statute of limitations that begins with a false claim instead of the retaliatory act will leave some whistleblowers without legal recourse.

Even where a retaliatory act occurs in the same time frame as the false claim, applying a six year statute of limitations to retaliation claims is contrary to the public policy behind statutes of limitations and would force employers to litigate stale claims. This Court has long recognized that statutes of limitations were created to balance plaintiffs' rights to pursue claims with defendants' rights to be free from defending stale claims. *E.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Federal and state legislatures have almost universally established statutes of limitations for comparable retaliation and whistleblower claims that are well under six years, with most federal statutes of limitations for retaliation claims set at six months or less, and most state statutes of limitations for retaliation claims set at two years. In the fast-paced and ever-changing employment environment, a protracted six-year statute of limitations will seriously and unfairly impede an employer's ability to defend stale FCA retaliation claims.

ARGUMENT

I. THE FALSE CLAIMS ACT'S SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD CLAIMS DOES NOT APPLY TO RETALIATION CLAIMS BECAUSE THE STATUTE AND LEGISLATIVE HISTORY DEMONSTRATE THAT CONGRESS INTENDED THE SECTION TO APPLY ONLY TO CLAIMS ALLEGING FRAUD IN VIOLATION OF SECTION 3279

A. Section 3731(b)(1)'s Six Year Statute Of Limitations Does Not Apply To Retaliation Claims By Its Terms And Because A Retaliation Claim Does Not Require Alleging Or Proving A Section 3729 Violation

The federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private person, including current and former employees, to sue any person who submits false bills to the United States for payment. The FCA is the primary weapon in fighting fraud against the federal government. S. Rep. No. 99-345, at 2 (1986) (hereinafter "S. Rep."), *reprinted in* 1986 U.S.C.C.A.N. 5266.

The FCA was rarely used in recent years until 1986, when Congress amended it to provide individuals with significant monetary incentives to file suits. S. Rep. at 1-2, 1986 U.S.C.C.A.N. at 5266-67. The 1986 revisions to the FCA also added a whistleblower protection section to prohibit retaliation against employees who report their employers for suspected violations of the Act or who help the federal government prosecute their employers. The law protects an employee who investigates, initiates, testifies for or assists in such an action. 31 U.S.C. § 3730(h).

While the language of Section 3731(b)(1) of the Act plainly requires that a fraud case under the FCA be brought within six years of the violation, the same is not true for

whistleblower retaliation cases. Nonetheless, in this case, the Fourth Circuit ruled that the six-year limitations period applies to those cases. Pet. App. 13a. The language of Section 3731(b)(1) cannot be fairly read to apply to retaliation claims, however, because it explicitly applies only to violations of Section 3729, namely, civil actions that allege fraud against the government.

Section 3731(b)(1) provides that "a civil action under 31 U.S.C. § 3730 may not be brought more than 6 years after the date on which the violation of 31 U.S.C. § 3729 is committed . . . ." 31 U.S.C. § 3731(b)(1). Section 3729 defines the scope of liability for presenting a false claim to the government. However, only two of the three causes of action under Section 3730 actually address a violation of Section 3729—Section 3730(a), which applies to false claims brought by the Attorney General, and Section 3730(b), which applies to *qui tam* fraud actions brought by individuals. "Because an anti-retaliation claim does not involve a 'violation of section 3729' but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply." Pet. App. 31a (Wilkinson, J., dissenting).

As Judge Wilkinson points out, the Fourth Circuit's application of Section 3731(b)(1) to retaliation claims "lops off half the statute." Pet. App. 30a (Wilkinson, J., dissenting). While the first part of Section 3731(b)(1) would appear to apply to retaliation claims, the second part does not. A false claim *may* be alleged at the same time as a retaliation claim, but decisions under the FCA have made clear that a retaliation claim can be brought where a *qui tam* fraud action has been unsuccessful or not even filed. *E.g.*, *Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004) ("A plaintiff may proceed under subsection (h) independently of a *qui tam* action."); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 238 n.23 (1st Cir.) ("A retaliation claim under 31 U.S.C. § 3730(h) does not require a

showing of fraud"), *cert. denied*, ___ U.S. ___, 125 S. Ct. 59 (2004). Thus, the language of Section 3731(b)(1) itself demonstrates that the 6-year limitations period was not intended to apply to retaliation claims.

B. The Legislative History Of The False Claims Act Shows That Congress Intended The Six-Year Statute Of Limitations To Apply Only To False Claims Actions

While the plain language of Section 3731 reveals that it does not apply to retaliation claims under the FCA, the legislative history of the Act also demonstrates that Congress intended the six-year statute of limitations to apply only to false claims. As the Ninth Circuit observed in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998), before the FCA was amended in 1986 to add its anti-retaliation provision, Section 3731(b) stated that a civil action under Section 3730 must be brought within six years from the date that "the violation" is committed. At the time, the only violations under the FCA involved the presentation of false claims to the government. When the FCA was amended, it added a new violation to Section 3730 (subsection (h)), retaliation against an employee who engages in protected activity. If Congress had not also amended the language of Section 3731(b), the 6-year statute of limitations would have clearly applied to actions under subsection (h). However, Congress narrowed the scope of Section 3731(b) to "violations of Section 3729," the section that specifically and strictly addresses false claims, not retaliation claims. *Lujan*, 162 F.3d at 1035. Congress' alteration of the language to cover only a "violation of § 3729" demonstrates that Congress intended the six-year statute of limitations to apply only to false claims cases and not to cases involving the newly-created retaliation claims.

While the Fourth Circuit suggested that the date of retaliation may be difficult to ascertain, Pet. App. 14a, the date of a retaliatory act, which involves a tangible employment action such as a termination, is normally easily determined. *See Moore v. California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002) (holding that behavior does not constitute retaliation under the FCA "unless it would be sufficient to constitute an adverse employment action under Title VII"). As the Ninth Circuit observed "[t]here is nothing covert or deceptive about retaliation-the victim feels its sting immediately." *Lujan*, 162 F.3d at 1035.[2]

Because the statute of limitations in Section 3731 does not apply to retaliation claims under the FCA, and the FCA does not provide for any other statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law." *Id.* (quoting *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989)). The most closely analogous statute of limitations under North Carolina law is the three-year period applicable to claims of wrongful discharge. N.C. Gen. Stat. § 1-52(5).

II. TYING THE STATUTE OF LIMITATIONS FOR RETALIATION CLAIMS TO FCA VIOLATIONS COULD DENY EMPLOYERS THE PROTECTIONS OF A LIMITATIONS PERIOD IN CERTAIN CASES AND LEAVE EMPLOYERS FREE TO RETALIATE AGAINST WHISTLEBLOWERS IN OTHERS

The Fourth Circuit's application of Section 3731(b)(1) to retaliation claims creates an illogical situation where the

[2] In addition, as the Petitioners demonstrated in their Petition for Writ of Certiorari, at 22-25, debate on the floor of Congress showed that Congress was concerned with creating a six-year statute of limitations to protect the United States' right to bring false claim actions, not an employee's right to bring retaliation actions.

statute of limitations is not tied to the action it seeks to punish. As Judge Wilkinson said:

> The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. . . . I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

Pet. App. 36a (Wilkinson, J., dissenting). Even though a retaliation claim can be brought where a fraud action has been unsuccessful or not even filed, the Fourth Circuit's decision starts the clock for a retaliation claim based on when a false claim occurred. In some situations, the result will be an unclear or non-existent statute of limitations.[3]

A. By Pegging The Statute Of Limitations To A False Claims Violation, Employers May Be Effectively Deprived Of Any Statute Of Limitations Protection Where No False Claims Violation Is Established

Courts have interpreted the FCA's definition of protected activity to include more than just allegations that an employer submitted false claims. An employee is also protected by the FCA when he collects information about *possible* fraud. *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1260 (D.C. Cir. 2004); *United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998). This investigation could lead to a retaliation claim, even if the employee determines that no fraud occurred. For example, an employee who suspects that bills submitted to the government were false may investigate and determine that

[3] Although these are all hypothetical situations, they are based on case law that has been developed in the less than twenty years that the FCA has allowed retaliation claims.

they were valid, leaving him or her with no basis for a false claim action under the FCA. However, that employee could bring a retaliation claim under the FCA for a virtually unlimited period thereafter, and the employer would be deprived of any statute of limitations protection, because under the Fourth Circuit's analysis, the statute would have never even started to run.

B. When The Case Remains Under Seal Until After The Statute Of Limitations Has Run Or The Employer Waits Until The Period Has Run To Retaliate, A Whistleblower's Retaliation Claim Will Be Time Barred Before The Retaliation Has Even Occurred

Using the date of a false claim rather than that of a retaliatory act to begin the limitations period also may pose problems for whistleblowers because of the unique nature of FCA claims. While typical retaliation claims have a close temporal relationship between a protected act and the retaliatory conduct based on them; that is not necessarily the case under the FCA. Section 3730(b)(2) provides that a false claim action brought by an individual must be filed under seal, and is not served on the defendant until ordered by the court. 31 U.S.C. § 3730(b)(2). Although the seal must last at least 60 days, it is not uncommon for the Department of Justice to keep cases under seal for years while it investigates and determines whether to join in the suit. For example, in *Williams*, the government took five years before it chose not to intervene in a false claim and retaliation action brought by a whistleblower. 389 F.3d at 1255. If a case is unsealed after six years, and an employee is fired the next day, the Fourth Circuit's reading of the FCA will leave him with no recourse. As a result, the filing of cases under seal creates the possibility that an employer will not even become aware of a whistleblower's complaint until the limitations period has expired, leaving the employer free to retaliate.

The Fourth Circuit's disconnect between the retaliatory act and the statute of limitations actually allows the whistleblower's employer to delay taking retaliatory action until after the limitations period has run, knowing that the whistleblower will then have no legal recourse. In contrast, where the statute is tied to the retaliatory conduct, as is the norm, the employee can seek recourse immediately, without fear of the statute having already expired. The employer even could put pressure on another employer to retaliate against a whistleblower. In *Nguyen v. City of Cleveland*, 121 F. Supp.2d 643, 644 (N.D. Ohio 2000), the City of Cleveland found out that a former employee had filed a *qui tam* action prior to leaving after the claim was unsealed. The City then put pressure on the whistleblower's current employer, a city contractor, to remove him from city contracts, leading to his termination. *Id.* at 644-45. Although the district court held that both the former and current employer could be liable for retaliation in that case, *id.* at 648-49, the City simply could have waited until the six years had run and pressured the contractor to terminate Nguyen with impunity under the Fourth Circuit's interpretation of the FCA. There are a number of other bizarre scenarios resulting from the Fourth Circuit's decision to replace the ordinary starting date for a retaliation claim with an unrelated one. For example, a whistleblower may first discover fraud more than six years after it occurred, and report it to the government. In that situation as well, the employee then could be terminated in retaliation for his report and yet have no recourse.

While the Fourth Circuit acknowledges that results such as the ones described above could occur, it concluded that the statute of limitations for retaliation claims is tied to the date that a false claim occurred because Congress intended to create a statute of repose for "simplicity of administration." Pet. App. 19a. The Fourth Circuit further suggests that these problems can be solved through the application of equitable tolling or equitable estoppel by the courts. Pet. App. 20a-21a.

There is no indication from the legislative history that Congress intended to create a statute of repose, however, and it is unreasonable to believe that an Act that was amended to prevent undetected, pervasive fraud in government contracting[4] potentially would leave those who report fraud without legal recourse in order to allow for "simplicity of administration."[5]

Furthermore, if the Fourth Circuit is correct in asserting that this is a statute of repose, then equitable tolling will not be available to provide relief to whistleblowers, even if there has been active fraud to prevent them from filing claims. *See, e.g., First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) ("a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body") (citation omitted).[6] As a result, the Fourth Circuit's insistence on starting the limitations period with a false claim instead of a retaliatory act potentially could leave without recourse whistleblowers who are blatantly retaliated against. This cannot be what Congress intended when it amended the FCA.

[4] *See* S. Rep. at 1-2, 1986 U.S.C.C.A.N. at 5266-67.

[5] As Judge Wilkinson states, "it is startling for the majority to suggest that Congress was bent, in the FCA no less, on establishing 'repose' for employers who first defrauded the government and then moved against the very persons who brought that fraud to light." Pet. App. 34a-35a (Wilkinson, J., dissenting).

[6] Even if equitable tolling were available, "[r]eliance on equitable tolling . . . undermines the value of having a statute of limitations in the first place and vests courts with unpredictable discretion . . . ." Pet. App. 37a (Wilkinson, J., dissenting).

III. APPLYING A SIX YEAR STATUTE OF LIMITATIONS TO RETALIATION CLAIMS WOULD BE CONTRARY TO THE PUBLIC POLICY BEHIND STATUTES OF LIMITATIONS AND FORCE EMPLOYERS TO LITIGATE STALE CLAIMS

A. Statutes Of Limitations Were Created To Balance Plaintiffs' Rights To Pursue Claims With Defendants' Rights To Be Free From Defending Stale Claims

Allowing an employee six years to file a retaliation claim forces employers to defend stale claims after memories have faded, and relevant witnesses and documents likely have disappeared. This Court has long recognized that statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations and internal quotations omitted). While affording plaintiffs with what the legislature deems a reasonable time to present their claims, "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* (citations omitted).

This Court also has recognized the purpose that statutes of limitation serve in employment cases: to guarantee the protection of employment laws to employees who promptly assert their rights while also protecting employers from "the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980) (citing *Johnson v. Railway Express*

Agency, Inc., 421 U.S. 454, 463-64 (1975)); *see also Early v. Bankers Life and Cas. Co.*, 959 F.2d 75, 80-81 (7th Cir. 1992) ("The short statutes of limitations in employment cases have a purpose--both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved--and it is ill served when the employer does not receive prompt notice of the dispute") (citation omitted). Public policy requires a balance between the need to protect whistleblowers with the need to protect employers from stale retaliation claims.

B. Federal And State Legislatures Have Recognized That Statutes Of Limitations For Retaliation And Whistleblower Claims Should Be Substantially Shorter Than Six Years In Order To Prevent The Prosecution Of Stale Claims

Legislatures determine the proper period for a statute of limitations by making "'a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Ricks*, 449 U.S. at 260 (1980) (quoting *Johnson*, 421 U.S. at 463-64). Nearly every time a federal or state legislature has had to make this value judgment, it has determined that the statute of limitations for retaliation claims should be substantially shorter than six years.

1. Most Federal Statutes Of Limitations For Retaliation Claims Are Six Months Or Less

Whenever Congress has had to determine the appropriate period for a statute of limitations for whistleblower claims, it has almost always restricted the period to six months or less. *See* Petition for Writ of Certiorari, at 11-12 and n.1. In addition to the statutes of limitations cited in the Petition for Writ of Certiorari, Congress has limited the filing period in employment discrimination and retaliation cases to less than a

year. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for example, Congress imposed a dual scheme of time limits. First, it provided that a person alleging an unlawful employment practice must file a timely administrative charge within 180 or 300 days after the occurrence of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e)(1).[7] Second, Congress specified that an individual claiming to be aggrieved under Title VII has 90 days within which to bring a civil action after receipt of a "notice of right to sue" from the EEOC pursuant to 29 C.F.R. § 1601.28. 42 U.S.C. § 2000e-5(f)(1). Congress later made these same time limits applicable to proceedings under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and applied a similar 90 day limit to actions under the Age Discrimination in Employment Act, 29 U.S.C. § 626(e). No other federal whistleblower or employment retaliation statute has created a statute of limitations as long as six years.

2. Most State Statutes Of Limitations For Retaliation Claims Are Two Years

Of the 50 state legislatures that have had to determine the point at which the interests in protecting valid retaliation claims are outweighed by the interests in prohibiting the prosecution of stale ones, only one state has determined that that point is at six years. In fact, our research indicates that most state personal injury statutes of limitations are only two years.[8] Only six states have set the limit at four or more years

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[7] The time-limit is 300 days in "deferral" states (*i.e.*, states having their own agencies with authority to grant or seek relief from the alleged employment practice), and 180 days in non-deferral states.

[8] *See generally* American Law of Products Liability 3d § 47:2 (Jan. 2004).

(Florida, Maine, Missouri, Nebraska, Utah, and Wyoming),[9] and only Maine has a six year statute of limitations. Thus, in the vast majority of states, the Fourth Circuit's decision will substantially increase the number and potential scope of stale retaliation claims that can be litigated.

C. A Six-Year Statute Of Limitations Will Result In An Enormous Burden On Employers To Defend Stale Claims After Witnesses And Documents Have Become Unavailable

Creating a statute of limitations for FCA retaliation claims that is so much longer than the ordinary statute of limitations for employment claims will substantially limit employers' ability to defend claims. In today's business world, rapid change and worker mobility are the orders of the day, and both litigants and fact-finders are likely to confront serious obstacles when faced with claims based on workplace events dating back six years. In the twelve month period ending in August 2004, for example, the turnover rate in the private sector was 25.1 percent. Employment Policy Found., Fact Sheet–Employee Turnover Is Expensive (Oct. 22, 2004)[10]. In this environment, an interval of six years can be like an eternity. Companies change hands. Operations are restructured. Employees leave to go to other companies, other industries, and even other parts of the world. And of course, even when witnesses are available, memories fade over such a long period.

In addition, employment records may disappear or become unavailable over a six-year period. Federal employment

[9] *See* Fla. Stat. § 95.11(3)(o); Me. Rev. Stat. tit. 14, § 752; Mo. Rev. Stat. § 516.120(4); Neb. Rev. Stat. § 25-207; Utah Code Ann. § 78-12-25; Wyo. Stat. Ann. § 1-3-105.

[10] *Available at* http://www.epf.org/pubs/newsletters/2004/fs20041022.pdf.

record-keeping regulations reflect at least some recognition by the employment law enforcement agencies of the burdens associated with keeping employment records for inordinately long periods of time. Thus, they generally limit mandatory record-retention periods, except insofar as they are relevant to pending administrative charges or lawsuits. In general, federal employment record-keeping regulations require employers to maintain documents for, at most, three years.[11] Under the applicable regulation of the federal Equal Employment Opportunity Commission (EEOC), the federal agency that enforces most federal anti-discrimination laws, the mandatory retention period for most employment records is one year. 29 C.F.R. § 1602.14. The Fourth Circuit's decision effectively requires employers to save all employment records for at least six years, even where no lawsuit has yet been filed. This would at least double the amount of time that current records are required to be kept, and add enormously to the record-keeping burden already faced by employers.

While the plaintiff will have personal knowledge of events, allowing her to prove the elements of a retaliation cause of action, the lack of witnesses and records after six or more years will make it extremely difficult for an employer to reconstruct events and mount a defense to a number of the elements of a retaliation claim under the FCA.[12] For

[11] For example, the Age Discrimination in Employment Act requires employers to maintain payroll records for three years and other personnel records for one year (29 C.F.R. §§ 1627.3(a), 1627.3(b)); the Fair Labor Standards Act of 1938 requires employers to maintain pay related records for three years (29 C.F.R. § 516.5(a)); the Family and Medical Leave Act of 1993 requires employers to maintain certain employment records for three years (29 C.F.R. § 825.500).

[12] To prevail on a retaliation claim, a plaintiff must show that she was engaged in a protected activity; that the employer had knowledge of the employee's activity and had either explicit or implicit notice that the activity could result in a FCA complaint being filed; and that the dis-

example, an employee could satisfy his duty to prove that the employer had knowledge of his protected activity by claiming that he notified the employer of the possibility of an FCA claim verbally six years earlier. If the employer's representatives who could rebut this claim are no longer available, it will be difficult for the employer to disprove this element. In addition, it will be difficult to prove or disprove the employer's motivation in making the allegedly retaliatory decision without the availability of relevant witnesses, significantly complicating the issue of causation and the mixed motive defense.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
ROBERT J. COSTAGLIOLA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States

ANN ELIZABETH REESMAN *
RICHARD C. SPITALNIK
MCGUINESS NORRIS &
WILLIAMS LLP
1015 Fifteenth Street, N.W.,
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

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* Counsel of Record

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crimination that she suffered was caused as a result of the protected activity. *See, e.g., Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861 (4th Cir. 1998).